No. 91-7604

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JEFFERY ANTOINE,
Petitioner,
v.
BYERS & ANDERSON, INC. and SHANNA RUGGENBERG,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE, NATIONAL COURT REPORTERS ASSOCIATION, IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICUS CURIAE

The National Court Reporters Association (hereinafter "NCRA"), formerly known as the National Shorthand Reporters Association, is made up of 30,000 professional court reporters of whom approximately 20,000 are currently practicing. The profession of court reporting is dedicated to the efficient and just operation of the judicial system and to ensuring equal access of all parties to the protections of the judicial process. The aim of NCRA is to promote these goals on a national basis. Among its other functions, NCRA promotes professionalism, conducts educational and certification programs, investigates the development and application of technology to court reporting, issues opinions and administers discipline for

violations of the profession's Code of Professional Conduct, and monitors and records the history and status of the profession. NCRA is uniquely qualified to provide the Court with illumination regarding the function of court reporting in the American legal system.

SUMMARY OF THE ARGUMENT

Court reporters should be given absolute quasi-judicial immunity when acting within the scope of their authority because that function is an integral part of the judicial process. Since all immunity relates to the function performed and not the title of the official, the immunity analysis is made person by person and function by function. Absolute immunity from personal liability is afforded judges for acts done in the exercise of functions which are judicial rather than administrative. The function of court reporting is a quasi-judicial act, not an administrative one, and thus deserves the same protection.

The function of the court reporter is inextricably entwined with the judicial process in the American system of jurisprudence. Historically, the judge performed the function of keeping a record of the proceedings through his personal notetaking. The purpose of this record was to aid him in the adjudicative process and for his reference and the reference of other judges in post-trial actions. Reliance on the accuracy of the record became essential to the appellate system. At the time of the seminal American case in the area of judicial immunity, *Bradley v. Fisher*, there was no consistent use of court reporters in American jurisprudence. Instead, the judge and litigants depended on the judge's notetaking or summary of the record. The evolution of the use of court reporters resulted from the desire to have a verbatim record for appellate purposes and the inability of the judge to both conduct the increasingly complex proceedings and take adequate notes to produce such a record.

The function now performed by court reporters enjoyed judicial immunity at common law because it was, in fact, a function performed by judges in the adjudicative process.

The court reporter continues to share certain functions in common with the judge. The court reporter, for instance, may stop the proceedings to clarify responses or identification and must constantly make decisions regarding the most accurate way to record the proceeding. The charge to the court reporter to produce a "verbatim" record is always filtered through the presumption that the record will also be an "intelligent" record of the proceedings. Trial judges and attorneys have uniformly lodged complaints against experiments with the use of audio and video records of proceedings done without a court reporter. Complaints have included instances where statements are lost when people speak over each other, physical gestures that should be part of the record are not recorded or interpreted, sounds that are not appropriately part of the record are recorded, and speaking parties are not named and thus confusion arises as to identification.

The acts of transcribing and certifying the record are also essential and inseparable elements of the judicial function of the court reporter because of the critical nature of the record to the judicial process.

The proof of the inextricable nature of the function of court reporting is that the record is not subsumed by the judge's opinion. On review, the appellate court is presented with not only the opinion of the judge, but also with the independent record of the proceeding below. The transcript is considered so essential that appellants who do not have access to a trial record may be granted a hearing, or in extreme cases a new trial, for that reason alone. The record of the proceedings is essential in every phase of the trial and appellate process and thus inextricably entwined in the judicial process.

The policies supporting the court reporter's immunity share the characteristics of the policies supporting absolute judicial immunity. Just as with judges, the independence of court reporters is essential to the judicial process. Just as with judicial errors, there are remedies for a court reporter's errors within the judicial process itself and additional professional safeguards as well. Finally, the threat of frivolous suits against court reporters, like those against judges, would severely hamper the efficiency of the courts and permit collateral attacks on judgments. The use of the qualified immunity standard will not remove the threat of vexatious litigation since there is no uniform standard of qualified quasi-judicial immunity for court reporters within the circuits and such suits will undoubtably be fact-based and therefore not amenable to summary judgment.

It has long been recognized that judicial immunity must be preserved, however erroneous the act may have been, and however injurious its consequences, as long as the act was within the jurisdiction of the court. The court reporter in the instant case was performing a function which was both within her authority and an integral part of the judicial process. Therefore, even if the Petitioner could prove that the sanctions imposed against the court reporter and the post-trial relief that he received were incomplete, the importance of quasi-judicial immunity to the judicial system demands it be preserved in the instant case. The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

I. THE STANDARD OF ANALYSIS FOR AFFORDING ABSOLUTE QUASI-JUDICIAL IMMUNITY IS WHETHER THE FUNCTION EXAMINED IS AN INTEGRAL PART OF THE JUDICIAL PROCESS AND NOT MERELY AN ADMINISTRATIVE ACT.

Absolute judicial immunity is afforded for acts done by judges "in the exercise of their judicial functions." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872). "If such [is] the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Id.*

The analysis of whether a particular function deserves absolute immunity turns on the nature of the function. *Forrester v. White*, 484 U.S. 219, 224 (1988).[1] In order to be afforded absolute judicial immunity, the nature of the function must be judicial rather than administrative, legislative or executive. *Id.* at 227.

Absolute immunity is also afforded to persons whose quasi-judicial functions are "intimately associated with" and an "integral part of" the judicial process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As the Court of Appeals for the Ninth Circuit stated in the present case:

> Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function.

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[1] A secondary analysis, the effect that exposure to liability would have on the appropriate exercise of the function, as well as various public policy factors that favor absolute judicial immunity as examined in *Forrester* and other decisions, are discussed in Section II below.

Antoine v. Byers & Anderson, Inc., 950 F.2d 1471, 1474 (9th Cir. 1991), *cert. granted*, —— U.S. ——, 113 S. Ct. 320 (1992).

A. The Function of the Court Reporter Is an Integral Part of the Judicial Process.

Consistent with the Court's approach in *Imbler*, the immunity analysis begins with an examination of the historical development and role of the court reporter [2] in the Anglo-American judicial process.[3] The Anglo-American judicial system developed a review or appellate process early in its history. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). The American process generally limits the appeal to a review of the record with no new testimony or fact finding in order to promote the policy of finality. *United States v. Burke*, 781 F.2d 1234, 1246 (7th Cir. 1985). Essential to this system is the accuracy of the record.

The critical nature of the record developed early in the common law and coincided with the development of the doctrine of judicial immunity. J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879, 881. Under Anglo-Saxon law in the tenth

[2] For purposes of this brief, the Amicus takes no position on the employment relationship, if any, between the Respondents, but rather will only address the issue of the availability of absolute immunity.

[3] *Imbler* involved an action against a state official under 42 U.S.C. § 1983 and this historical analysis has been the traditional starting point for analysis by the Court in questions of immunity for persons acting under color of state law. This Court has held that common law immunities, such as judicial and quasi-judicial immunity, were not abolished by the Civil Rights Act of 1871, now 42 U.S.C. § 1983 (1988). *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Instead, an analysis is made of "the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. This same analysis should apply in the present case, which involves an action against an individual who was acting as a federal agent under 28 U.S.C. § 1331 (1988). *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982).

and eleventh centuries, a dissatisfied litigant could bring a charge of "false judgment" whereby the court issuing the judgment was required to make a written record of its proceedings and submit it to a superior lord. The complainant could either accept the record, thereby narrowing the issues on appeal to a review of the lower court's decisions, or challenge it by participating in physical combat with the champions of the inferior court. If the challenge to the record succeeded, the judgment was annulled. *Id.*

This process of contesting the written record by physical combat was eventually replaced by the doctrine of sanctity of the record, which reflected the confidence of all parties in the records kept of the king's court proceedings. This doctrine was developed to bring a measure of finality to the case. *Id.* at 883. Once the record was presumed correct, then the appeal was limited to questions of law and the sufficiency of the lower court's determinations.

During the same period, the ecclesiastical model of hierarchical courts began to influence the development of the common law appeal process. *Id.* at 882. The doctrine of judicial immunity was then employed to enhance the concept of finality, by eliminating collateral attacks against the judge, and forcing appeals up through the court hierarchy. *Id.* at 884.

While a faithful and intelligent record [4] of the proceedings has always been essential to the appellate process, a verbatim record was not always required. In early English courts, the official record took the form of notes taken by the judge during the proceeding and used by him in the adjudicative process and by others in the

[4] The term "faithful and intelligent" is used to describe a record which is not merely a mechanical reproduction of sounds that occurred, but one that includes the detail, organization and identification required to make it intelligible as well as accurate.

post-trial appellate process. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 5-8, 19-20 (1983). It was impossible, of course, for most judges to both conduct the trial and attempt to produce anything resembling a verbatim record.[5]

The shift in American courts from fact-pleading to notice-pleading around the time of World War II, with the concomitant increase in the use of discovery and depositions as well as the availability of technology such as stenographic machines, combined to make the verbatim record both possible and desirable. David J. Saari, *The Court and Free-Lance Reporter Profession* 43 (1988). In 1944, Congress enacted the Court Reporter Act, ch. 3, 58 Stat. 5 (the current version of which is codified at 28 U.S.C. § 753 (1988)), which required all federal courts to make verbatim records of their proceedings.

It is generally agreed that the first verbatim court reporter was hired by the New York State Supreme Court in 1866. Jim Haviland, *Philander Deming's Role*, Nat'l L.J. at 15 (Apr. 12, 1982). The practice grew slowly, and, as Petitioner notes in his brief, at the time of *Bradley v. Fisher*, in 1871, there was not a general use of court reporters. (Petitioner's Br. at 32, n.24.) This does not mean that the function of the court reporter, establishing a written record of the proceedings for use at trial and in appellate proceedings, was not being performed. As stated above, it was being done by the judge, albeit in a form less useful than the verbatim form preferred today.

Accordingly, the production of the written record of court proceedings is intimately associated with and is

[5] It is not unusual for oral testimony to occur at a rate of up to 260 words per minute, the current skill test requirement for the Certificate of Merit issued by NCRA to its Registered Professional Reporters. *See* National Court Reporters Association, The NCRA RPR and CM Certification Program 1 (Jan. 1990) (lodged with the Clerk).

an integral part of the judicial process, not simply because it is inextricably intertwined with the appellate process, but, perhaps more importantly, because it was once and to some extent still is performed by the trial judge as part of his adjudicative actions. *See* Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 Judicature 368, 373 (1973). When the *Bradley* Court recognized the doctrine of judicial immunity in 1871, the process of producing a written record of the proceeding was necessarily one of the acts to which it was granting immunity, since it was a function performed by a judge as part of the adjudicative process at that time.

Modern court reporters share in several other functions exercised by judges. Like the judge, the court reporter can stop the proceedings to clarify something for the record and may direct questions to witnesses and counsel. Like judges, court reporters are completely independent of all the parties. This is necessary in order to ensure their impartiality. Like judges, a primary purpose of the court reporter is to ensure equal access by all litigants to the protections of the judicial process. The primary means of doing this is by providing a faithful, intelligent and independent record of the proceedings. This function has evolved even further with modern technology, to the point where a court reporter using computer-aided transcription equipment can now produce simultaneous "real-time" written text, braille text, and text-integrated video of an oral proceeding, in order to assure equal participation and access by physically impaired and disabled litigants, judges, jurors and counsel. This function of ensuring equal protection is a judicial function of the highest order.

Since its seminal decision on absolute judicial immunity in *Bradley* over one hundred twenty years ago, the Court has been asked on several occasions to analyze the immunity appropriate to the functions of other officials who are involved in the judicial process. As noted above,

in *Imbler*, the Court stated that an analysis of whether to grant immunity to a given official had to be done on the basis of whether the acts of the official had been accorded immunity "at common law and the interests behind it." *Imbler*, 424 U.S. at 421.

Imbler involved an allegation about the conduct of a state prosecutor.[6] The Court discussed the doctrine of judicial immunity and the policy behind it and concluded that "the [state prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 424. In its various decisions, the Court has not only granted absolute quasi-judicial immunity to prosecutors, as in *Imbler*, but also to jurors, *see Butz v. Economou*, 438 U.S. 478, 509-10, 511-12 (1978), and witnesses, *Briscoe v. LaHue*, 460 U.S. 325 (1983), for acts which are intimately associated with and an integral part of the judicial process.

We can find no decisions by this Court on the question of whether a court reporter's function is similarly protected by quasi-judicial immunity. The several courts of appeals that have considered this question have been split in their decisions.

The court reporter's function of recording, transcribing and certifying the proceedings is an integral part of every phase of the judicial process. Petitioner himself states that it is so important that it was essential to his civil rights. (Petitioner's Br. at 30). Federal courts must make a verbatim record of the proceedings and the record must be certified. 28 U.S.C. § 753(b). During trial, the record may be read back by the court reporter to refresh memory or impeach a witness. Trial transcripts are relied upon by judges in the adjudicative process. Transcripts of trials must be ordered by the appellant and provided to the appellate court. *See, e.g.*, Fed. R. App. P. 10(b). Such transcripts are "deemed prima facie a correct statement of the testimony taken and proceedings had" (*id.*) and the appellate court will rely on their accuracy in making its decision. The record, and therefore the court reporter who constructs the official record, plays an integral part in each phase of the judicial process and is inextricably entwined with it.

[6] Although *Imbler* was brought under 42 U.S.C. § 1983, the same analysis of judicial immunity applies to cases, such as the present one, which are based on 28 U.S.C. § 1331 (1988). *See* note 3 *supra*.

B. The Function of the Court Reporter Is Judicial in Nature, Not Administrative.

As articulated in *Forrester* and other cases, the "functional" test requires a determination that the nature of the function is judicial and not administrative. In the present case, Petitioner's characterization of the process of producing a verbatim record as being a mechanical or administrative one is overly simplistic and does not square with reality.

In *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989), Judge Posner, writing for the court of appeals in an opinion granting absolute immunity to both a judge and court reporter alleged to have conspired against a litigant, addressed both the function of the court reporter and the policy behind absolute immunity as follows:

> A judge has absolute immunity from damages liability for acts performed in his judicial capacity, *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L.Ed.2d 555 (1988), and the preparation of the record for appeal is such an act. It is not a matter simply of gathering all the documentary and nondocumentary materials that have been filed in the case and shipping them to the appellate court. Determining the composition of the appellate record entails a number of decisions that require skill and judgment. Cf. Fed.R.App.P. 10. Even the preparation of an

accurate transcript by the court reporter is not a mechanical process, given the difficulty of accurately transcribing what often are rapid-fire oral testimony and colloquy. Auxiliary judicial personnel who perform functions at once integral to the judicial process and nonmechanical are entitled to absolute immunity from damages liability for acts performed in the discharge of those functions, just as judges are. See *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir. 1987), and cases cited there. Although these cases precede *Forrester*, where the Supreme Court distinguished judicial from merely administrative functions, their principle has been reaffirmed since. See *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987), which held that a court clerk could not be sued for refusing to accept an amended filing and otherwise (it was alleged) abusing his authority.

870 F.2d at 377.

Recent experiments have been conducted in an attempt to substitute audio or video recordings of court proceedings for professional court reporters. The products of those experiments have been routinely criticized by both judges and attorneys. *See* Oregon State Court Appellate Videotape Evaluation Committee, Videotape Court Reporting 6-8 (Sept. 1992) (lodged with the Clerk); *see also* Justice Research Institute, "Making the Record," Court Reporting and Technology 8 (March 4, 1992) (lodged with the Clerk) (stating that over 90% of federal district court judges currently elect to use court reporters even though the alternative of electronic sound recording has been available since 1984). These judges and lawyers complain that an exact and mechanical reproduction of the trial proceeding is inadequate to produce a record that is both faithful and intelligent for use by an appellate tribunal.

The difficulties arise because, without a court reporter present to monitor the proceeding and filter the oral

colloquy, the record may have inaudible areas where people speak over each other; there are noises that are inappropriate to the record that are recorded (such as sidebars or background noise); there are physical or visual events that should be part of the record that do not appear (such as answers given by head movements or pointing to a document); and speakers may be unidentified or misidentified. *See* Saari, *supra*, at 45. The Judicial Concerns & Standards Commitee of the American Judges Association recently concluded that the use of a professional court reporter was essential because "electronic recording may not reflect the gestures, demeanors, and postures of witnesses or help in descriptive matters." American Judges Association, 1991-1992 Electronic Court Reporting 5 (n.d.) (lodged with the Clerk).

The construction of a faithful and intelligent record of a proceeding requires much more than just the mechanical reproduction of every sound. Indeed, the definition of "verbatim" may even differ from court to court according to local practice, but it rarely means every sound made. The court reporter's function includes constant filtering of the oral activity, even to the point of intervening in and stopping the trial, to ensure that the record faithfully and intelligently reflects all that has transpired and not just the noises that occurred.[7]

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[7] Like the Ninth Circuit below, Amicus rejects the idea that a function must be discretionary to be immune. *See, Antoine*, 950 F.2d at 1476 n.4. While it is true that in many cases the use of discretion is a factor in granting a particular immunity, this is not a requirement for all grants of absolute immunity. For instance, under *Briscoe v. La Hue*, absolute quasi-judicial immunity is available to witnesses to encourage the independence of their testimony. 460 U.S. at 333. The Court in *Briscoe* did not grant absolute immunity to witnesses based upon any discretionary function. Indeed, witnesses are instructed to answer each question posed to them and only the question posed and to tell the whole truth. A witness who decides to exercise discretion in whether or not to answer a question may be subject to contempt and one who decides to exercise discretion in whether or not to tell the truth may be

The Petitioner has attempted to separate the act of transcribing and constructing the record from all the other functions of the court reporter and seeks to characterize it as a mechanical or administrative function. (Petitioner's Br. at 19.) It is artificial and unrealistic, however, to separate the process of transcribing and constructing the record from the function of recording it by means of handwritten or machine-generated notes during the actual court proceeding. They are one and the same activity and deserve the same immunity. In a case where the judge based his decision on his personal notes, it would be ludicrous to suggest that the act of his taking notes would receive absolute immunity—because it was part of the adjudicative function—but that he could be sued if his handwriting were illegible or he lost his notes on the basis that these were mechanical or administrative functions.

The act of transcribing and constructing the record, which is essentially a function of translating the notes taken during trial into a comprehensive written record, involves constant decisions about accuracy, including such minute details as the insertion of the correct punctuation to reflect the meaning of the speaker. The function of the court reporter is clearly judicial and not administrative in nature.

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liable for perjury. The rationale applied to the grant of absolute immunity to witnesses is that they fulfill a function that is an "integral part of the judicial process." 460 U.S. at 335. This is the same analysis that must be applied to the function of the court reporter. Having said that, while discretion is not a requirement for immunity, in fact, as the discussion of the function above reveals, the court reporter is frequently called upon to exercise discretion to ensure an intelligent record.

II. THE POLICIES UNDERLYING ABSOLUTE JUDICIAL IMMUNITY SUPPORT ABSOLUTE QUASI-JUDICIAL IMMUNITY FOR COURT REPORTERS.

As the Court stated in *Forrester*, "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." 484 U.S. at 224. The policies behind granting absolute immunity for judicial acts have their basis in common law policies designed to ensure the independence of the person performing the function (*Bradley*, 80 U.S. (13 Wall.) at 347) and to remove barriers to the effective conduct of the court system, *see, e.g., Imbler*, 409 U.S. at 425; *see also* Block, *supra*, at 886-87 (quoting *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607)).

The Court has enunciated on several occasions a variety of policy concerns underlying absolute immunity.[8]

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[8] In *Cleavinger v. Saxner*, the Court listed the following non-exclusive characteristics of a function deserving absolute immunity:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

474 U.S. 193, 202 (1985) (citing *Butz v. Economou*, 438 U.S. at 512).

In *Pierson v. Ray*, Justice Douglas listed the following policy justifications for absolute judicial immunity:

> (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers.

386 U.S. 547, 564 n.4 (1967) (Douglas, J., dissenting).

The three policy considerations most pertinent to the analysis of the function of court reporting are (i) the need to ensure the independence of the person performing the function; (ii) whether there are other safeguards and remedies that reduce the need for private damages; and (iii) the avoidance of vexatious litigation and collateral attacks on the judicial process. An analysis of these three policy considerations supports the granting of absolute immunity to the function of court reporting.

A. It Is Essential to the Judicial Process to Ensure the Independence of the Function of Court Reporting.

It is crucial that the person making the record of the proceedings be independent of any party. The fact that counsel, litigants and even judges cannot unilaterally direct the court reporter to change something in the transcript is essential to the doctrine of sanctity of the record. For instance, if a judge could privately order deletions in a faithful and intelligent transcript—that otherwise would include descriptions of disparaging sounds or gestures made by the judge—then a litigant who wished to appeal a judgment based on the bias of the judge would be hard put to present such an argument. The integrity of the judicial process would also be undermined if counsel to one party could privately pressure the court reporter to delete or change portions of a transcript by threat of litigation.

The importance of an independent record cannot be questioned in a judicial system such as the American one where the appellate tribunal receives not just the opinion of the judge of the lower court, but also a certified record of the proceedings. Only by having both the opinion and the record can the appellate court decide important questions of judicial error or prejudice. *See* Saari, *supra* at 46. Furthermore, since the judge and other participants are aware that a verbatim record is being made of the proceedings, the record becomes "an enemy of capriciousness." *Id.* (quoting David W. Louisell & Maynard E. Pirsig, *The Significance of Verbatim Recording of Proceedings in American Adjudication*, 38 Minn. L. Rev. 38 (1953)). In order to ensure an independent record, the court reporter must be independent, which can only be achieved by absolute immunity from liability.

B. There Are Other Remedies and Safeguards Available That Reduce the Need for Private Damages.

Innumerable safeguards and remedies, both procedural and professional, are available to correct errors made by a court reporter. Here, the federal rules offered a means of reconstructing the transcript and of remanding the case for a further consideration of possible prejudice due to the lack of an adequate transcript.[9] See Fed. R. App. P. 10(c). The court below could and did take personal actions against the court reporter who was arrested and fined. Order of United States District Court for the Western District of Washington: 1) Granting Defendants' Motion for Summary Judgment; 2) Denying Plaintiff's Motions for Leave to File Amended Complaint; and 3) Order of Dismissal, February 16, 1990, Joint Appendix at 24. Errors in transcripts can be corrected by motion or sua sponte in open court. Errors in deposition transcripts can be corrected by agreement of the parties. The decision of a judge not to correct an alleged error in the transcript can be appealed. This Court has recognized that the presence of such procedural safeguards and remedies means there is a less pressing need for individual suits to correct constitutional errors. *Butz v. Economou*, 438 U.S. at 512.

In addition to these procedural safeguards, the profession itself provides safeguards by the training, qualification and discipline of official reporters. NCRA certifies

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[9] An extreme example of this remedy is *Bashlor v. Wainwright*, 375 So. 2d 871 (Fla. Ct. App. 1979), where a life sentence judgment was vacated and a new trial ordered when no transcript was available and the death of the judge and defense counsel prevented reconstructing one.

court reporters with a designation of Registered Professional Reporter and various states require certification.[10] The requirements to become a Registered Professional Reporter ("RPR") are rigorous and continuous. In order to become an RPR, an individual must pass both a written knowledge test and a skills test. *See* NCRA, How Your Continuing Education Program Works 2-3 (n.d.) (lodged with the Clerk).

NCRA RPR certification is lost if thirty continuing education credits are not satisfactorily completed in every three year period. *Id.* RPR Certification may also be lost for disciplinary reasons. Since 1987, violations of the Court Reporter's code of ethics have been reviewed by NCRA and actions taken. The code of ethics covers such areas as conflict of interest, confidentiality, dereliction of duty and fraud. NCRA, Code of Professional Conduct 3 (n.d.) (lodged with the Clerk).

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[10] Various courts require that official court reporters serving in their courts have state certification or RPR certification or be in the process of obtaining registration. *See, e.g.*, 28 U.S.C. § 753(g); *see also*, Letter from Bruce Rifkin, Clerk, U.S. District Court, Western District of Washington, to Randall M. Johnson (Aug. 12, 1987), Joint Appendix at 19. NCRA supports this requirement and urges court administrators to institute strict standards for the performance of court reporters. Both the judicial system and the court reporting profession will benefit from the best possible performance standards, just as the judicial system benefits from the best possible performance by judges, counsel, witnesses and jurors. *See* NCRA, A Case for State Certification of Shorthand Reporters (July 1992) (lodged with the Clerk). Unfortunate facts like those of the instant case, where a court hired a noncertified reporter who failed to produce a timely transcript even with the use of her notes and audio recording, might be addressed most effectively in the future by courts simply refusing to make such hiring decisions.

C. It Is Critically Important to the Judicial Process to Preclude Vexatious Suits Against Court Reporters and the Collateral Attacks Such Suits Provide.

The avoidance of vexatious suits and collateral attacks on the judicial process is the third primary policy consideration for the granting of absolute immunity. *See Butz*, 438 U.S. at 512. The threat of a volume of vexatious suits against court reporters would seriously hamper the conduct of the judicial process. Not only would the volume of cases clog the courts and remove court reporters from the courtroom and their regular duties (as well as judges and other critical court personnel needed as witnesses), but it would open an avenue for collateral attack on the underlying judgment. As Judge Posner stated in *Scruggs v. Moellering*, holding that absolute quasi-judicial immunity was appropriate for a court reporter, "[t]he danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts—alleging as here a conspiracy between the adjunct and the judge—warrants this extension of the doctrine." 870 F.2d at 377.

Petitioner suggests that the use of qualified immunity rather than absolute immunity and the availability of summary judgment will eliminate the problems of vexatious suits and collateral attacks. (Petitioner's Br. at 29.) However, a closer analysis of decisions involving qualified immunity demonstrates that this is not so.

One problem is that there is no uniform standard for qualified quasi-judicial immunity. This Court has attempted to narrow the qualified immunity standard for acts by executive branch officials by stating that executive officials are shielded from civil liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. A district court within the Eighth Circuit, however, without

mentioning a standard of conscious disregard of the rights of others, has stated that qualified immunity for court reporters is available for an act the reporter was "specifically required to do under court order or at a judge's direction." *Formanek v. Arment*, 737 F. Supp. 72, 73 (E.D. Mo. 1990).

The Court of Appeals for the Fifth Circuit, in contrast, has afforded qualified immunity to court reporters only if their acts are pursuant to lawful authority and also in "good faith." *Rheuark v. Shaw*, 628 F.2d 297, 305 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). Good faith, however, is evidently not a part of the qualified immunity standard for court reporters in the Second Circuit. A district court in that circuit was faced with an allegation that a court reporter had made a bad faith alteration to the transcript. The court stated that qualified immunity was available, because the court reporter was acting at the judge's direction, but actually based its decision on derivative absolute immunity. The judge was alleged to have directed the alteration, and the court stated that since the judge was immune from liability then the reporter was also immune. *Neville v. Dearie*, 745 F. Supp. 99, 105 (N.D.N.Y. 1990). This lack of uniformity in the qualified immunity standard for the court reporters makes the use of summary judgment as a means of eliminating suits against them almost useless.

The second problem with qualified immunity for court reporters is that in most jurisdictions it is generally both fact-based and intent-related. As Justice Field said in justifying absolute immunity for judges, "[f]ew persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." *Bradley*, 80 U.S. (13 Wall.) at 348. Such allegations will be disputed by the respondent and summary judgment will not be useful. In *Briscoe*, the Court observed that lawsuits against witnesses in criminal trials would generally turn on the defendant's state of mind and "[s]ummary judgment is usually not feasible under these circumstances. If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial." 460 U.S. at 343 n.4 (citation omitted).

Yet another problem with qualified immunity is that it offers litigants a tempting opportunity to make collateral attacks on judgments.[11] Collateral attacks would defeat the policy of finality and undermine the appellate system. *See Bradley*, 80 U.S. (13 Wall.) at 349. "The loser in one forum will frequently seek another, charging participants in the first with unconstitutional animus." *Butz*, 438 U.S. at 512. Since summary judgment will not be useful in such circumstances, a hearing will be required. An attack on the accuracy of the transcript, for instance, may very well require the presence of the judge, jurors, counsel and witnesses from the first trial in a virtual recreation of the first proceeding. A finding that the transcript was inaccurate could even lead to a new trial. The policy in favor of finality of cases would then be defeated.[12]

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[11] An interesting question is whether the designation of the court reporter's function as administrative would then open a new avenue of attack against judges whose acts of supervising such administrative personnel would also be considered administrative not judicial. At the very least, the increased expense to the court reporter of obtaining liability insurance would be a cost undoubtedly passed on in increased court costs.

[12] Justice Field's fear of the never ending process of judges judging judges is echoed by visions of challenges to court reporters reporting cases challenging court reporters, *ad infinitum*. See *Bradley*, 80 U.S. (13 Wall.) at 349.

CONCLUSION

Absolute immunity is sparingly granted (*Imbler*, 424 U.S. at 427), but in cases where a judicial act was not outside the scope of authority, no matter how injurious the consequences, the importance of the doctrine demands its application. *Bradley*, 80 U.S. (13 Wall.) at 347. There has been no suggestion in the instant case that the actions of the court reporter were outside the scope of her authority. The function being performed by the court reporter, the recording and transcription of the record of a criminal trial, was an integral part of the judicial process and not an administrative act. The policies supporting judicial immunity support absolute quasi-judicial immunity for the function of court reporting. Accordingly, for the reasons stated above, NCRA respectfully requests that the Court affirm the decision of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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